UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

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MACKENZIE ARCHITECTS, P.C.

Plaintiff,

v.

VLG REAL ESTATE DEVELOPERS, LLC; VICTOR GUSH; FGR ASSOCIATES, LLC; CAPTAINS LOOKOUT DEVELOPMENT, LLC; DESIGN LOGIC ARCHITECTS, PC; CLARK REALTY, LCC; PAUL CLARK; FRANK TATE; and ROBERT BUCHER

Defendants.

X______________________________X

Civil Action No. 1:15-cv-1105 (TJM/DJS)

AFFIDAVIT OF STEPHEN MACKENZIE

I, Stephen Mackenzie, being duly sworn, state the following to be true:

1. My name is Stephen Mackenzie. I am the principal of Mackenzie Architects, P.C. ("Mackenzie Architects"), the plaintiff in this matter. I reside in Burlington, Vermont. I am over eighteen years of age.
2. I am prepared to testify at deposition or trial as to all of the facts sworn to here.
3. On or about January 5, 2009, Mackenzie Architects delivered the architectural designs and drawings ("Mackenzie Architects Designs") to defendant FGR Associates, LLC, attached to the Amended Complaint as Exhibit B.
4. I created the Mackenzie Architects Designs in my capacity as a principal of Mackenzie Architects. Thus, Mackenzie Architects owns the copyrights in both the architectural designs and technical drawings as a work for hire.
5. The name "Mackenzie Architects, P.C." is listed as the Architect of the Mackenzie Architects Designs. This name appears on every page.

6. The Mackenzie Architect Designs are wholly original. I did not copy from any architectural work.

7. Under my agreement with Defendants FGR Associates, any license given did not extend to a license to allow another architect to use my designs, adapt my designs, or take credit for my designs.

8. I have reviewed the architectural designs filed with the Cohoes Building and Planning Department (Captains Lookout Designs), attached to the Amended Complaint as Exhibit C.

9. Any architectural work must, by necessity, consist of features that are commonplace, such as doors and windows. However, it is the particular combination of each of these elements in a work that makes it aesthetically unique.

10. Although the Captains Lookout Designs are substantially similar to mine, they bear the name "Design Logic Architects, P.C." Upon information and belief, the principal architect of Design Logic is Robert Bucher. I have never met Robert Bucher. No representative from Design Logic assisted in any manner with the creation of the Mackenzie Architects Designs.

11. Along with capitalizing on the site's Hudson River frontage, one of my primary project goals for the Captain's Lookout Project was to reinforce a residential personality for the 140 unit project, and not create an institutional looking monolith. Our design is unique by virtue of the Project's unconventional aesthetic combination of otherwise conventional individual elements. Our aesthetic approach features the items discussed in this affidavit.

12. The overall multi-phase building design features the use of a ziggurat building footprint (a series of connected "V", "L", or "W" shapes) for the 140 unit project. The aesthetic appeal is to make the project look like a cluster of individual buildings as opposed to a singular institutional monolith. The ziggurat is a rare design strategy for a project of this size. *See*

Exhibit 1 (showing the side by side comparison of the site plan for the Mackenzie design with the site plan for the Design Logic design, and the substantial design similarity between the two).

13. The design features the use of building facade segments both parallel to and at a 45 degree angle to the respective Hudson River and Delaware Avenue sides. The aesthetic appeal of the parallel facade edges is to frame a consistent setback relationship on both sides. The aesthetic appeal of the 45 degree facade orientation is to allow the design to present itself more directly and appealingly as the project is approached from either along the street or river directions. A comparison of Mackenzie drawings A-200 through A-205 with Design Logic's drawings A-1.0 through A-1.7 illustrates the substantial similarity of the design feature. *See* Exhibit 1; *see also* Exhibit 2 (showing the side by side comparison of a floor plan for the Mackenzie design with a floor plan for the Design Logic design, and the substantial design similarity between the two.)

14. The design features the placement of interior horizontal and vertical building circulation on the street side edge opposite from the Hudson River, not the more conventional placement in the middle of the building. One of the aesthetic aspects of this is the enhancement of view and daylighting opportunities for the interior corridors and elevator lobbies. The other is that it also consolidates and allows greater flexibility in creating more aesthetically pleasing interior unit designs without the interference of building circulation or common spaces. This placement of circulation is also a rare design strategy for a multifamily housing project of this size. A comparison of Mackenzie drawings A-200 through A-205 with Design Logic's drawings A-1.0 through A-1.7 illustrates the substantial similarity of the design features. *See also* Exhibit 2.

15. The design features the placement of elevator towers outside the building core as an aesthetic expression. The aesthetic nature of this is to add additional massing elements to the design vocabulary as a way to reinforce a more playful, less monolithic scale, as well as a different fenestration/material treatment opportunity. This is also a relatively rare design strategy for a project of this size and type. *See* Exhibit 2.

16. The design features the absence of any common corridor connections between phases, such that each phase stands alone. This incremental strategy enables a much smaller scale design personality and experience for residents within the complex, and likewise facilitates an incremental phasing of individual buildings to suggest the same residential mindset. A comparison of Mackenzie drawings A-200 through A-205 with Design Logic's drawings A-1.0 through A-1.7 illustrates the substantial similarity of the design features. *See also* Exhibit 2.

17. The design massing features clusters of sloped hip shaped roof elements. This is much more suggestive of a residential aesthetic vocabulary than the use of a flat or monolithic roof design. A comparison of Mackenzie drawings A-300 through A-303 with Design Logic's drawings A-3.0 through A-3.3 illustrates the substantial similarity of the design features. *See also* Exhibits 4 and 5 showing a side by side comparison of single phase building elevations for the Mackenzie design with single phase building elevations for the Design Logic design, and the substantial design similarity between the two.

18. The design features the placement of all living room spaces for all units on the Hudson River side and all circulation on the Delaware Avenue side. The aesthetic appeal is reflected in a number of ways. One is to allow for a more expansive and attractive façade window expression along the river for key living spaces. Another is the greater amount of daylight

and views on the Hudson River side to enhance interior aesthetics for all living spaces. Especially significant is the ability to offer a more dramatic aesthetic tension between the street and river side facade expressions. There is a sense of discovery in moving through the building, as one first approaches and enters the lobby, then moves through the common corridors and elevators, and finally enters the units where the river views suddenly and dramatically appear. A comparison of Mackenzie drawings A-200 through A-205 with Design Logic's drawings A-1.0 through A-1.7 illustrates the substantial similarity of the design features. *See* Exhibit 1; *see also* Exhibits 2 and 3.

19. The design features the placement of all of the housing floors above a parking level podium. The aesthetic appeal of this is to facilitate a more elegant overall design expression for the building, as illustrated by the use of masonry cladding for the base and clapboard siding on housing levels above. By elevating the housing level it also enhances view and daylight opportunities for all of the interior spaces. A comparison of Mackenzie drawings A-300 through A-303 with Design Logic's drawings A-3.0 through A-3.3 illustrates the substantial similarity of the design features. *See* Exhibits 4 and 5 (showing a side by side comparison of single phase building elevations for the Mackenzie design with single phase building elevations for the Design Logic design, and the substantial design similarity between the two).

20. The overall multi-phase design features the presence of a series of exterior courtyards as defined by the ziggurat shaped footprint. This is a very important aesthetic consideration in recognizing how buildings shape outdoor rooms in the same manner that rooms shape buildings. One of the most basic architectural aesthetic maxims is that every element should be designed in relation to its next larger context, be it a chair in a room, a room in a house or

a house within a neighborhood. All too often buildings do not take this principle into account, shouting for attention or simply ignoring their context in a self-centered manner. The use of the ziggurat shape significantly softens and improves the aesthetic impact and scale of the overall project. *See* Exhibit 1; *see also* Exhibit 2.

21. The design features balconies only on the river side. The aesthetic appeal of this is to add a more playful design feature for the river side exterior expression and enhance the dramatic contrast between the two building sides. A comparison of Mackenzie drawings A-300 through A-303 with Design Logic's drawings A-3.0 through A-3.3 illustrates the substantial similarity of the design features. *See* Exhibit 4 (showing a side by side comparison of a single phase building elevation for the Mackenzie design with a single phase building elevation for the Design Logic design, and the substantial design similarity between the two).

22. In addition to the similarities listed above, the Captain's Lookout Designs have the same combination and placement of exterior materials such as clapboard siding, wood shakes, masonry (podium base), and hip roof massing.

23. Each of these similarities is readily apparent from a simple side by side comparison of the drawings. However, I believe more careful explanation by an architect may assist the court or a juror in assessing the degree of similarity.

24. The similarities between the Mackenzie Architects Designs and the Captains Lookout Designs are so pervasive that the latter must have been created by copying ours.

25. Mr. Bucher's affidavit alludes to some of the alleged differences. Many of his statements are untrue or misleading.

26. My designs include what Mr. Bucher's affidavit refers to as a "key plan" on the cover page (¶ 6). The purpose of a key plan to orient a reader (often a developer, builder, or other non-

architect) to see the overall framework of the project. The key plan is beneficial for the viewers so that they understand the greater layout and intent of the project, and is often provided for a phased project such as Captain's Lookout. But a complete examination of the Mackenzie Architects Designs reflects that they contain precise, specific designs in addition to the "key plan."

27. I have not removed dimensions or notes from the designs, despite Mr. Bucher's accusation that I did. These annotations are all present as shown on drawings A-200, A-201, A-202, 203, A-204 and A-205, among others. Mackenzie Architects Designs pages A-200 through A-205 and Design Logic's drawings A-1.0 through A-1.7 are sufficient to compare the dimensions between the Mackenzie Architects Designs and the Captains Lookout Designs.
28. I can further discuss the similarities in dimensions when called to testify.
29. Mr. Bucher's affidavit notes that the designs attached as exhibits to the Complaint are small and thus "certain design elements" are "difficult to read." If requested by the Court or by other parties during discovery, I will provide enlarged versions of the designs.
30. Mr. Bucher's affidavit states that my plan "resembles a 'W'" and that his "resembles a 'V'" but it is unclear how these are different. The pattern is the same. A "W" is merely a set of interlocked "V"s. Both designs consist of aesthetically individual "V" shaped buildings that are ganged by phase to create the master plan or overall site build-out, going from a "V" (Phase 1) to a "W" (Phase 1 and Phase 2 combined) to the eventual overall master plan ziggurat of connected buildings. In both designs, none of the buildings are connected by internal horizontal or vertical circulation, with the exception of the ground parking level circulation. *See* Exhibit 1; *see also* Exhibit 2.

31. Mr. Bucher's affidavit states that "[t]he pedestrian entrances to the buildings are substantially different." However, both designs feature (1) pedestrian entries at the center of each "V", (2) a common stair and elevator in each elevator, and (3) three common area egress stairways for each phase. *See* Exhibit 1; *see also* Exhibit 2.

32. Mr. Bucher's affidavit points out numerous different amenities in his plan and mine, such as the indoor pool, spa, fitness room, changing rooms, and elevator access (¶ 10). Each of these is a functional element that do not affect my designs' overall aesthetic and appeal. I have no knowledge as to whether the developers intend to include these amenities in the final project.

33. Mr. Bucher's affidavit states that Design Logic's design is "symmetrical" and mine is "asymmetrical" (¶ 12). Both designs are symmetrical, and I am at a loss as to why Mr. Bucher's insists mine is not, other than the fact that our first phase end units are slightly different. Moreover, in Paragraph 18, Mr. Bucher appears to argue that my designs are "mirror images" (¶ 18). See Exhibit 1 (showing the side by side comparison of the site plan for the Mackenzie design with the site plan for the Design Logic design, and the substantial design similarity between the two); See also Exhibit 2 (showing the side by side comparison of a floor plan for the Mackenzie design with a floor plan for the Design Logic design, and the substantial design similarity between the two.)

34. Mr. Bucher alleges that "[t]he roofing system designs of the Mackenzie Plan are significantly different" (¶ 15). But both roof designs are substantially similar aesthetically, each having a similar pattern of hip roofs to make the buildings look like a residential cluster of smaller masses.

35. Mr. Bucher alleges that the exterior elevations are substantially different (¶ 17), but neglects to explain that both designs feature: 1) double hung windows; 2) masonry for the building

base at the parking level; 3) clapboard siding on the second, third, and fourth levels with contrasting spandrel cladding vertically linking the window elements; 4) wood 'shakes' effect on the fifth level and on selected massing elements such as entries, stairs, and elevators; and 5) sloped hip roof elements to create an aesthetic of clustered building masses. For the east exterior elevations, both designs likewise feature (6) balconies on this side of the building only. For reference see Mackenzie drawings A-300 and A-301, and Design Logic drawings

36. In contrast to Mr. Bucher's insistence that "no reasonable fact finder could look at the" designs and "conclude that the layouts are substantially similar," a simple visual comparison reveals many similarities in the placement of spaces in the layout by virtue of the common corridor on the back or street side of the buildings in both designs. Specifically, in both designs, the living/dining/kitchen sequences of spaces (as they move away from the outer side to the unit interiors), and the bedroom/closet/bathroom sequences are similar in design. *See* Exhibit 1; *see also* Exhibit 2.

37. When called as a witness in this matter, I am prepared to discuss these similarities in more detail, as well as address any differences in the designs.

I declare (or certify, verify, or state) under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on April 8, 2016.

Stephen Mackenzie
Mackenzie Architects, P.C.

Facades @
45° angle
to street
Courtyards
Facades parallel
to street
Entries
SITE STATISTICS
CURRENT ZONING: PLANNED DEVELOPMENT DISTRICT P-D
PROPOSED USE: MULTI-FAMILY RESIDENTIAL
140 DWELLING UNITS
NUMBER OF STORIES: 4 (ABOVE THE GARAGE)
PARCEL AREA: 6.400 ACRES (278,787 SF)
LOT COVERAGE: 3.430 ACRES (53.6%)
PARKING: REQUIRED: 140 UNITS x 2.0/UNIT = 280 (8 TO BE HANDICAP)
PROVIDED: 212 COVERED, 86 SURFACE = 298 (INCL. 8 HANDICAP - SURFACE)
GREEN SPACE: 2.970 ACRES (46.4%)
WATER: 0.457 ACRES (7.1%)
BUILDING: 2.200 ACRES (34.4%)
PAVEMENT / TRAIL: 1.230 ACRES (19.2%)
DELAWARE AVENUE
HUDSON RIVER
MACKENZIE ARCHITECTS P.C.
162 Battery Street, Burlington, Vermont 05401 T.802.863.7177 F.802.863.7877
Site Plan
0 15' 30' 70'
North
Captain's Lookout
Cohoes, New York
11/05/2007
DELAWARE AVENUE
HUDSON
RIVER
SG-1
Overall building
ziggurat footprint
Courtyards

Site Plan
Mackenzie Architects

Site Plan
Design Logic - Design

Exhibit 1

Site Plan

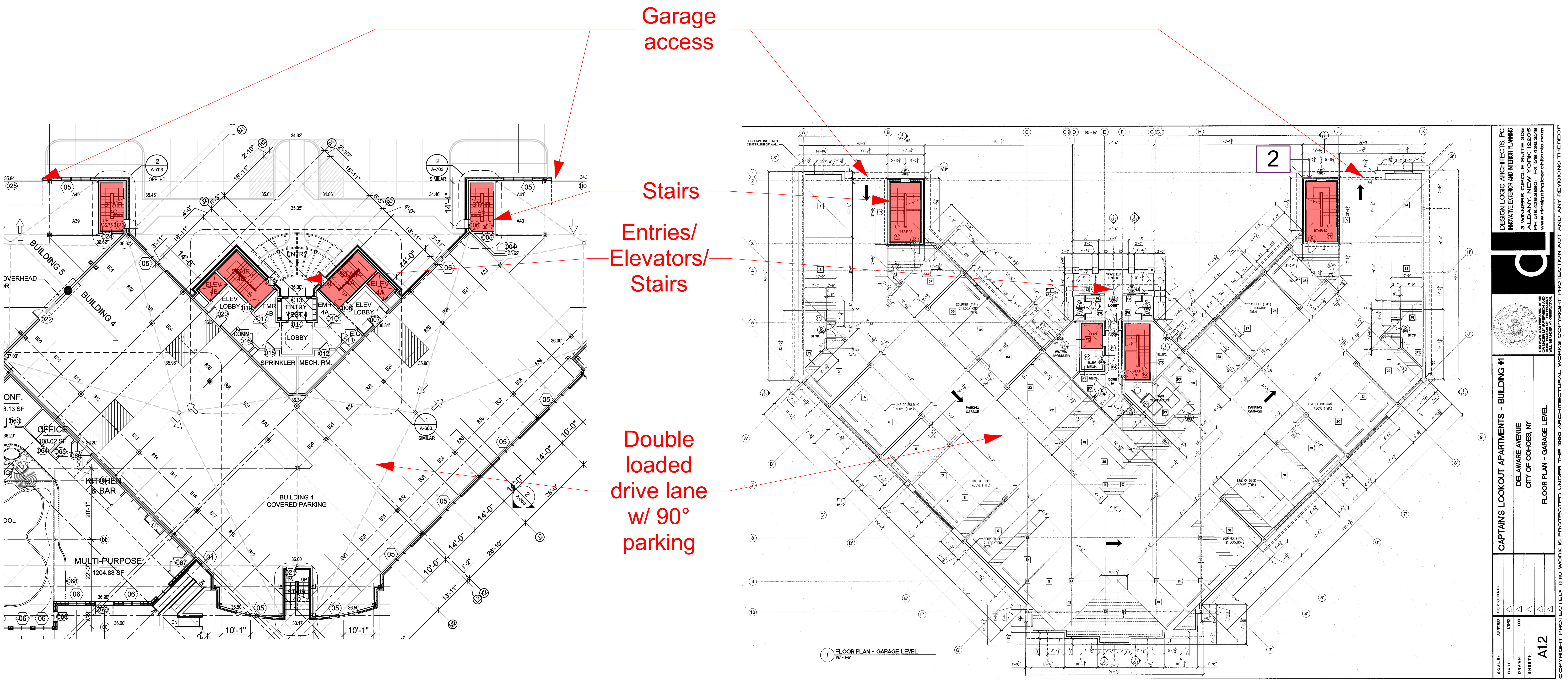
45°
angled
facade
Stairs
Entries/
Elevators/
Stairs
Corridors
Apartments
Balconies

Floor Plan
Mackenzie Architects

Floor Plan
Design Logic

Exhibit 2

Single Building Phase Floor Plan Example


Garage access
Stairs
Entries/ Elevators/ Stairs
Double loaded drive lane w/ 90° parking
BUILDING 4 COVERED PARKING
ENTRY
LOBBY
SPRINKLER
MECH. RM.
KITCHEN & BAR
MULTI-PURPOSE
OFFICE
BUILDING 5
BUILDING 4
CAPTAIN'S LOOKOUT APARTMENTS - BUILDING #1
DELAWARE AVENUE
CITY OF COHOES, NY
FLOOR PLAN - GARAGE LEVEL
A1.2
FLOOR PLAN - GARAGE LEVEL

Garage Plan
Mackenzie Architects

Garage Plan
Design Logic

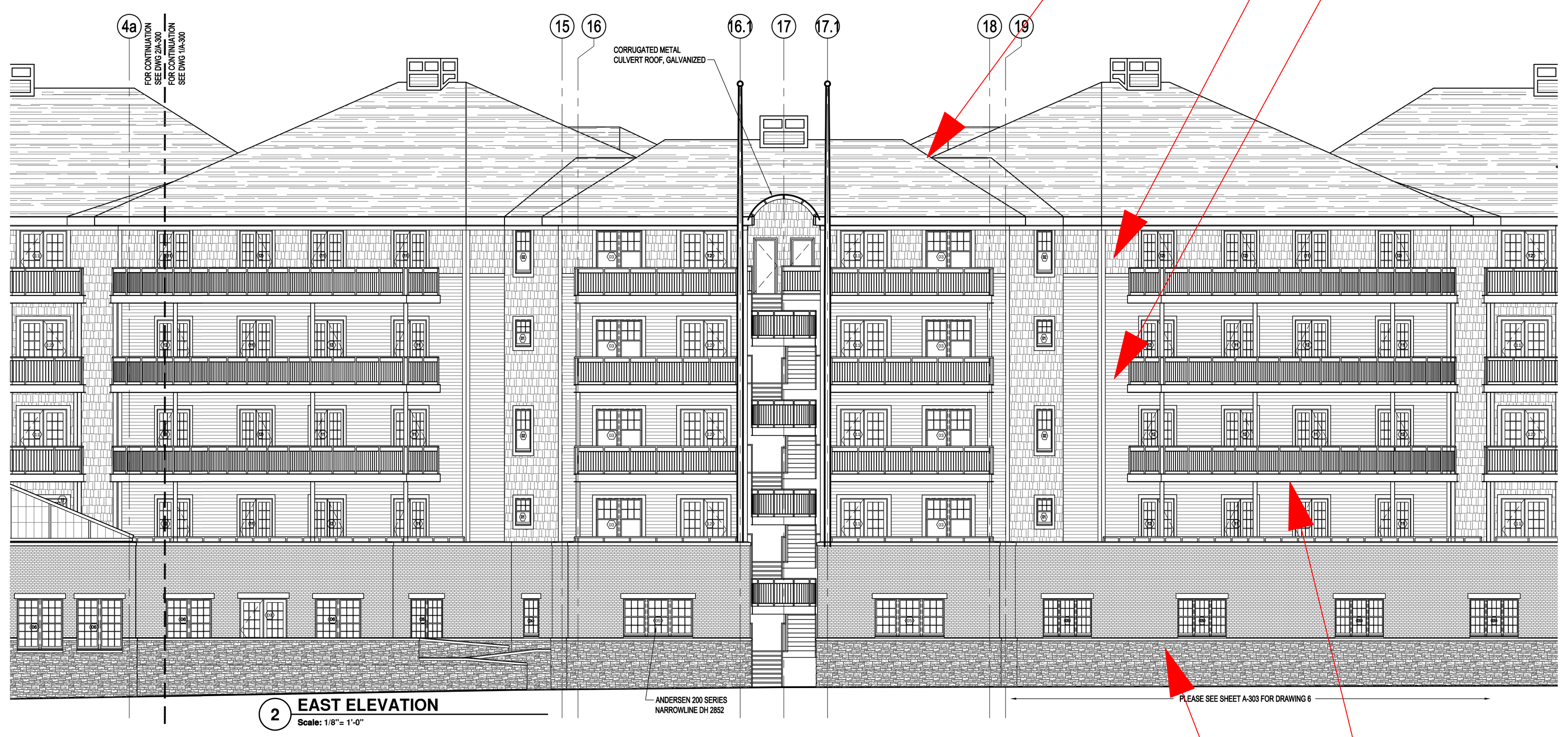
Exhibit 3

Single Building Phase Garage Plan

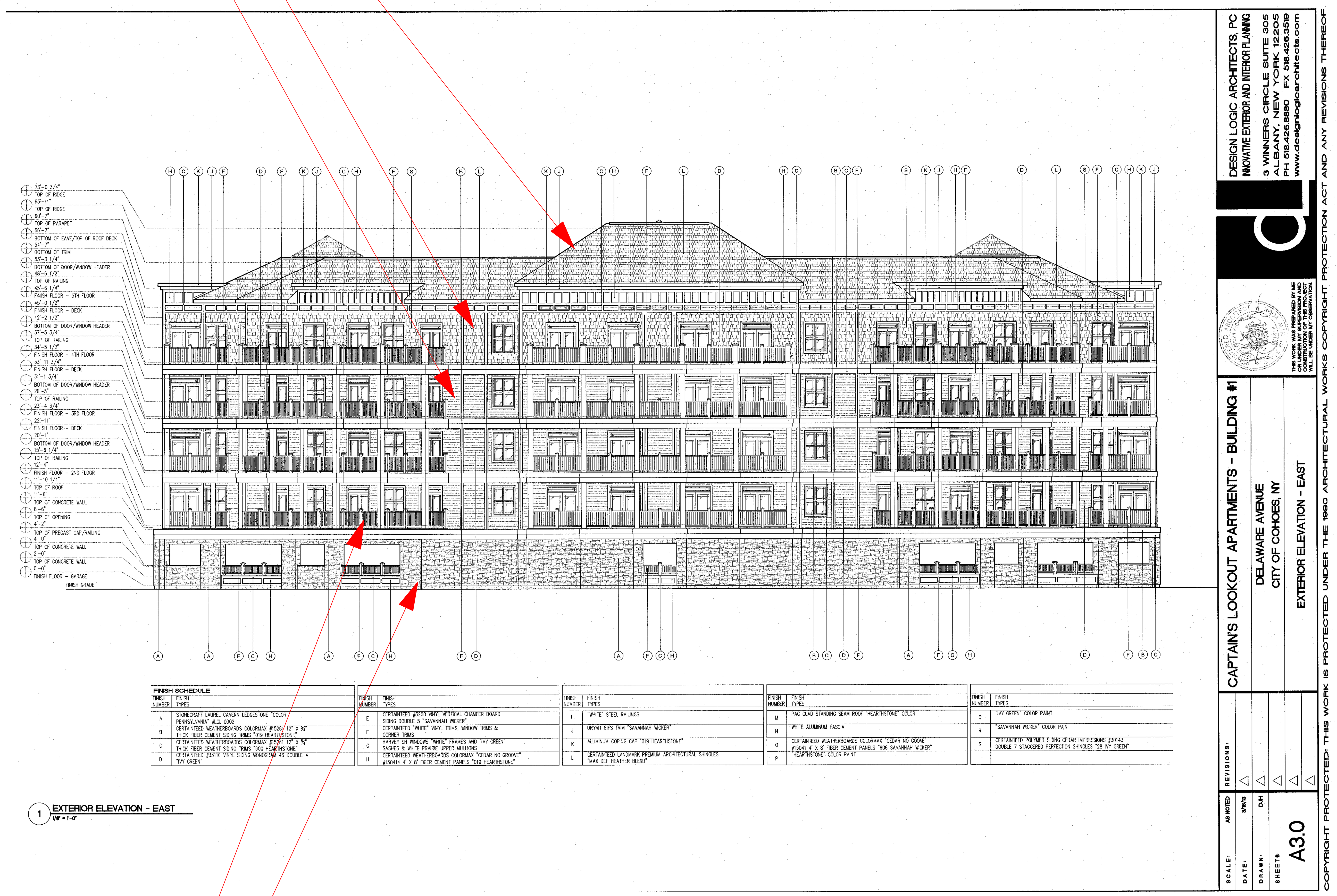
Sloping hip roofs

Wood shakes @ top floors

Clapboard siding 3 levels



EAST ELEVATION



EXTERIOR ELEVATION - EAST
DESIGN LOGIC ARCHITECTS, PC
CAPTAIN'S LOOKOUT APARTMENTS - BUILDING #1
DELAWARE AVENUE
CITY OF COHOES, NY
EXTERIOR ELEVATION - EAST
A3.0

Balconies this side only

Masonry base

East Elevation
Mackenzie Architects

East Elevation
Design Logic

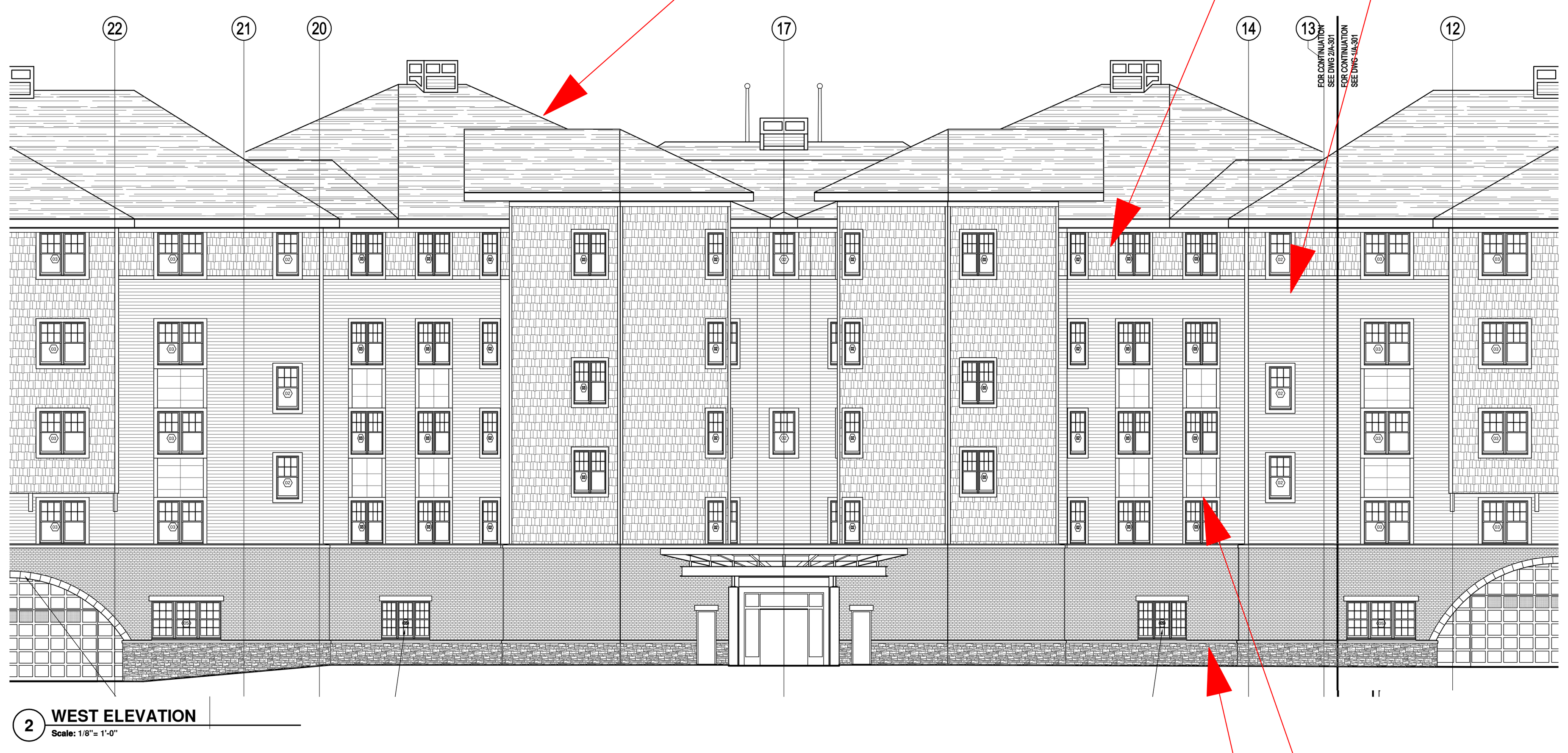
Exhibit 4

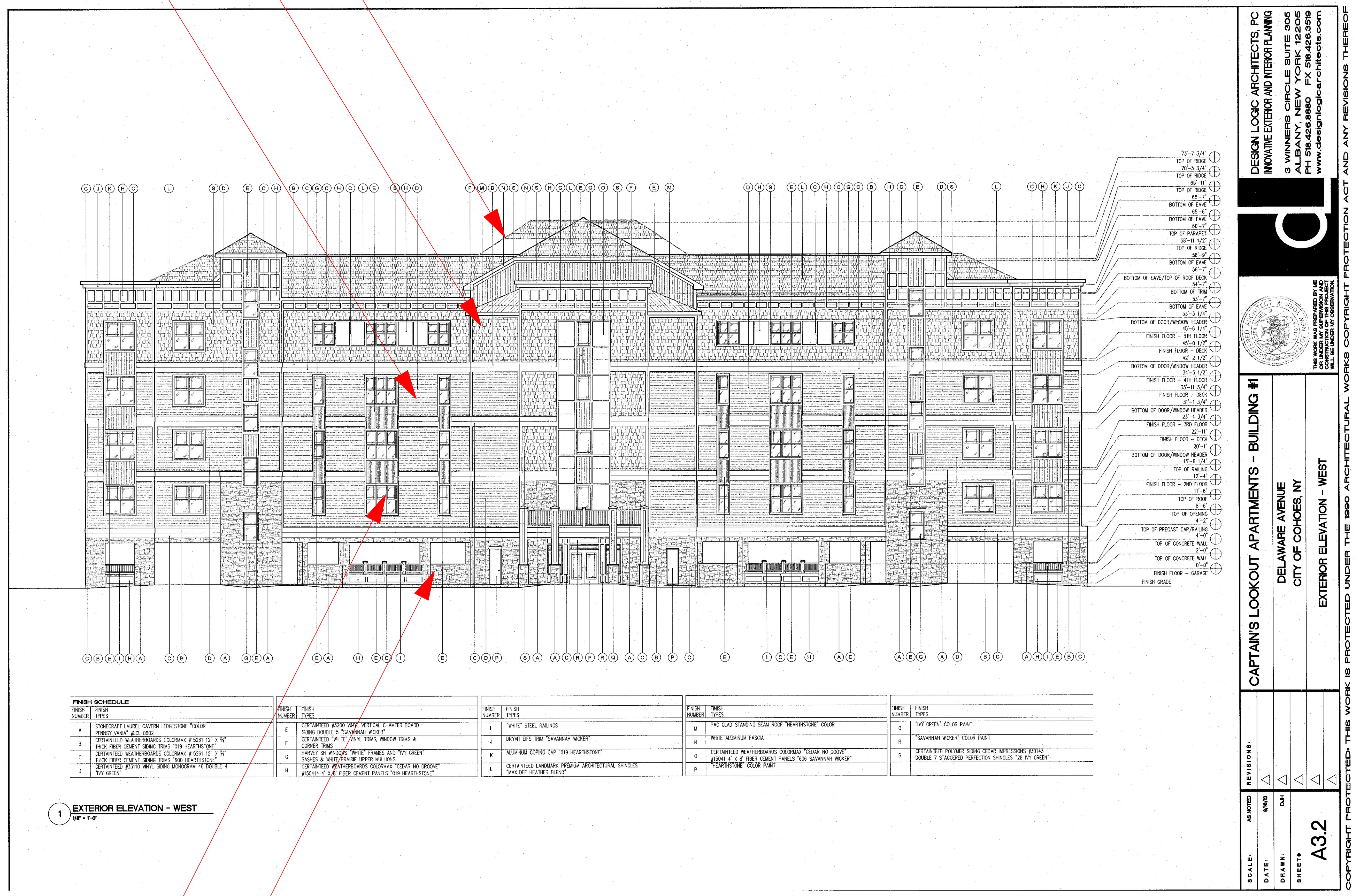
Single Building Phase East Elevation

Sloping hip roofs

Wood shakes @ top floors

Clapboard siding 3 levels


WEST ELEVATION


EXTERIOR ELEVATION – WEST
FINISH SCHEDULE
DESIGN LOGIC ARCHITECTS, PC
CAPTAIN'S LOOKOUT APARTMENTS – BUILDING #1
DELAWARE AVENUE
CITY OF COHOES, NY
EXTERIOR ELEVATION – WEST
A3.2

Vertically linked spandels & windows

Masonry base

West Elevation
Mackenzie Architects

West Elevation
Design Logic

Exhibit 5

Single Building Phase West Elevation